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No. 85-694 (3)

IN THE

Supreme Court of the United States

October Term, 1985

DOUGLAS A. DOWTY,

Petitioner,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC., UTILITY WORKERS UNION OF AMERICA,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PIONEER RURAL ELECTRIC COOPERATIVE, INC., UTILITY WORKERS UNION OF AMERICA,

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, Utility Workers Union of America, AFL-CIO, respectfully asks that the petitioner's request that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review its opinion and judgment be denied.

Statement of Case

The petitioner, Douglas A. Dowty ("Dowty") was employed by the respondent, Pioneer Rural Electric Cooperative, Inc. ("Pioneer"), and was a member of the respondent, Utility Workers Union of America, AFL-CIO ("Union"). The Union was and is the exclusive bargaining representative of certain employees of Pioneer which bargaining unit included Dowty. The Union and Pioneer entered into a collective bargaining agreement which provided, *inter alia*, for a grievance procedure culminating in final and binding arbitration.

On November 7, 1980, Pioneer informed Dowty that he would be dismissed for violating a company rule forbidding certain types of outside employment. A timely grievance was filed. The Union represented Dowty in grievance proceedings. On January 5, 1981, Ted L. Earl, Esq., advised the Union in writing that his firm had been retained by Dowty in the matter of Dowty's discharge. Mr. Earl offered to assist the Union in handling the grievance. The Union did not respond to this offer.

On May 15, 1981, an arbitration hearing was held. Dowty was present at the hearing and represented by a Union official. The case was heard by a three-member panel. On June 24, 1981, its chairman, a neutral arbitrator, issued an "Award of Arbitrator."

The neutral arbitrator ruled, *inter alia,* that Dowty should be given ten days to decide whether he would give up certain outside activities. If Dowty gave these up, then Pioneer would have to reinstate him without back pay.

On July 7, 1981, a meeting took place between Dowty and three Union officials. The decisions below all rest upon what transpired at this meeting. The Union has included the affidavits with supporting exhibits of Edward J. Coggins, Jr., Regional Director of the Union, and of Dowty as an appendix to this brief. On July 7th, Coggins read to Dowty the complete 17-page document labeled "Award of Arbitrator" with a final page labeled "Award." Coggins also read the post-hearing briefs of both parties to Dowty (A2). The "Award of Arbitrator" states that Dowty need not give up that part of his outside business activities which involve selling electrical generators (A19). However, part IV of the "Award" requires Dowty to agree to discontinue his "outside business activity" as a condition of reinstatement (A20-21). Coggins told Dowty that he had asked the neutral arbitrator to clarify this point and that the arbitrator felt that Dowty could continue to sell, install and service electric generators (A2). Dowty was also

told that the Union would concur in part IV of the "Award." Finally, Dowty was advised to take his job back under the terms of the "Award" (A3).

The affidavit of Dowty in no way disputes the essential elements of the affidavit of Coggins (A22). Dowty pointed out and the Union never disputed that Dowty did not receive a copy of the "Award" until July 10, 1981.

On January 8, 1982, Dowty filed a complaint setting forth a hybrid § 301/duty-of-fair-representation claim against Pioneer and the Union. The complaint alleged that the Union breached its duty of fair representation

> by failing to adequately prepare and present plaintiff's position, by failing to offer or allow the assistance of counsel, by failing to object or waiving the objection to the appointment of a non-neutral arbitrator, by concurring in the arbitration award, by failing to further prosecute plaintiff's claim and by failing to take other actions necessary to protect the rights of plaintiff.

Complaint, ¶ 23 (quoted in *Dowty v. Pioneer Rural Electric Cooperative, Inc.*, 573 F.Supp. 155, 157 [1983]).

The United States District Court for the Southern District of Ohio dismissed this complaint pursuant to the Supreme Court's decision in *Del Costello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983).

Reasons for Denying the Petition

Despite the lengthy list of rhetorical questions presented in the petition, this case hinges on two straightforward issues:

1. whether the rule adopted by the Sixth Circuit conforms to both federal labor policy and the rulings of other courts of appeals; and

2. whether the application of that rule was an abuse of discretion.

I.

The rule adopted by the Sixth Circuit conforms to federal labor policy and other circuit court decisions.

The Sixth Circuit held:

> For the purposes of a hybrid §301/unfair representation action, the time the statute of limitations begins to run is when the claimant knows or should have known of the union's alleged breach of its duty of fair representation.

Dowty v. Pioneer Rural Electric Cooperative Inc., 770 F.2d 52, 56 (6th Cir. 1985). The court relied upon its earlier decision in *Shapiro v. Cook United, Inc.*, 762 F.2d 49 (6th Cir. 1985) in which it decided to apply the general rule that the § 10(b) limitations period of the National Labor Relations Act begins to run when the claimant "discovers, or in the exercise of due diligence should have discovered the acts constituting the alleged violation." *Id.* at 51 (citing *NLRB v. Allied Products Corp.*, 548 F.2d 644, 650 [6th Cir. 1977]).

The rule adopted by the Sixth Circuit has been adopted by every court of appeals which has ruled on this issue of when a § 301/duty-of-fair-representation claim accrues. *Santos v. District Council of New York City*, 619 F.2d 963, 989 (2d Cir. 1980); *Scott v. Local 863, Int'l Bhd. of Teamsters*, 725 F.2d 226, 229 (3d Cir. 1984); *Farr v. H.K. Porter Co., Inc.*, 727 F.2d 502, 505 (5th Cir. 1984); *Metz v. Tootsie Roll Ind., Inc.*, 715 F.2d 299, 304 (7th Cir. 1983); *Price v. Southern Pacific Transportation Co.*, 586 F.2d 750, 752 (9th Cir. 1978); *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881 (11th Cir. 1985).

In his petition, Dowty claims that the decisions in *Benson v. General Motors Corp.*, 716 F.2d 862 (11th Cir. 1983), *Farr v. H.K. Porter Co., Inc., supra,* and *Price v. Southern Pacific Transportation Co., supra,* all conflict with the Sixth Circuit's ruling in *Dowty*. Dowty seeks a

rule based on his discovery of the full extent of his injuries. This has never been the rule for an accrual of a cause of action in any forum. The cases relied upon by Dowty do not support his argument. In fact, these cases demonstrate the correctness of the Sixth Circuit's approach.

In *Price* the Ninth Circuit ruled that a duty-of-fair-representation claim accrued when an employer denied plaintiff's petition for reinstatement. The union took no action after that date. Therefore any injury to Price caused by the union's failure properly to represent him became "fixed and reasonably certain." *Id.* at 754. The decision does not imply that every possible injury must be known, only that plaintiff's injuries not be unduly speculative. *See also Archer v. Airline Pilots Ass'n Int'l*, 609 F.2d 934, 937 (9th Cir. 1979).

In *Benson*, the Eleventh Circuit held that the plaintiffs' action accrued when they became aware of their injury—to wit, a loss of seniority. *Benson v. General Motors Corp., supra*, at 864. However, the court went on to hold:

> For the purpose of determining when the §10(b) period begins to run, we look to when plaintiffs either were or should have been aware of the injury itself, not to when plaintiffs became aware of one of the injury's many manifestations.

Id. The court remanded the case for a determination as to when plaintiffs had or should have had knowledge of their loss of seniority. The court pointed out that this could have occurred when seniority lists were first posted. If such lists were in fact posted, then the claim would accrue with the posting, not with plaintiffs' layoff, and therefore was not brought within six months. *Id.*

The *Farr* court agreed with and adopted the ruling of the *Benson* court. *Farr v. H. K. Porter Co., Inc., supra*, at 505. The Fifth Circuit then remanded the case for findings as to when the injury occurred and plaintiffs became aware of it. *Id.* at 506.

The handling of the accrual issue in post-*Del Costello* cases by the circuit courts is in conformity with both federal labor policy and general federal policy regarding the accrual of claims. The general rule of accrual in federal cases is that a cause of action accrues when the plaintiff could first have successfully maintained a suit based on that cause of action. *Santos v. District Council of New York City, supra,* at 968-69; *Bell v. Aerodex, Inc.,* 473 F.2d 869, 873 (5th Cir. 1973). In a hybrid § 301/duty-of-fair-representation claim, this moment clearly occurs when the employee both knows (or reasonably should know) that the employer and union have injured him and when the employee has exhausted contractural or internal union remedies. *See Clayton v. U.A.W.,* 451 U.S. 679 (1981); *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965).

Dowty wants this Court to embellish this well-settled rule by requiring that the action doesn't accrue until the employee has received a copy of a written arbitration award *and* learns the full extent of his injuries. As to the latter, it should not be nor has it ever been the case that a plaintiff can delay bringing suit until every aspect of his injury is known. Nor has any plaintiff been turned away by a court for not knowing every aspect or potential manifestation of his injury. It has always been a general rule of law that an action accrues when an injury either occurs or is discovered. The full extent of the injury is an issue left to discovery and trial. This rule has been used successfully in the labor field as shown by the cases relied on by Dowty. *See Benson v. General Motors Corp., supra; Farr v. H.K. Porter Co., Inc., supra.* The liberal amendment provisions of the Federal Rules of Civil Procedure adequately protect plaintiffs who learn of another manifestation of their injuries after commencing an action.

Dowty suggests that the statute of limitations at least be tolled until an employee receives a copy of an arbitrator's decision. For the Court to adopt this requirement it will first have to reverse the main principle of its *Del Costello*

decision. *Del Costello* stands for nothing if not the doctrine that a uniform statute of limitations shall apply in all hybrid § 301/duty-of-fair-representation actions regardless of the underlying facts of those actions. In particular, the rule should not depend on the presence or absence of an arbitrator's award. *Del Costello v. Int'l Bhd. of Teamsters, supra,* at 154-55, 171-72.

Furthermore, the need for an employee to have a copy of the arbitrator's award is an issue which can be readily handled as an issue of fact within the framework of the accrual rule used by the Sixth Circuit. In a recent case, a district court was presented with just such an opportunity. An employee was injured by a successor employer's decision to place incumbent employees at the bottom of a seniority list. The union and employer arbitrated the issue without notifying the employee. The employee learned ten months later of the existence of the award but was unable to obtain a copy for another year and brought suit three months thereafter (25 months after the arbitration was held). *Katsaros v. Transit-Mix Concrete Corp.,* 585 F.Supp. 576, 578 (S.D.N.Y. 1984). The trial court held that Katsaros had knowledge of almost every element of his action when he learned of the decision. The court dismissed the complaint except for an allegation of union misconduct at the arbitration hearing itself. The plaintiff was given an opportunity to demonstrate that only by reviewing the written decision with an attorney could the employee know if the union's conduct at the hearing was improper. *Id.* at 579. *See also Craft v. Automotive, Petroleum & Allied Industries Employees Union, Local 618,* 754 F.2d 800, 803 (8th Cir. 1985) (*per curiam*) (fact plaintiff never received written award is irrelevant).

Finally, the imposition of a rule that every arbitrator's decision be in writing and given to an employee would effectively add a provision to the parties' collective bargaining agreement. National labor policy is designed to allow employees to select representatives and bargain in good

faith with their employers. The actual details of any agreement reached are outside the province of the courts and the Labor Board. This Court has made it plain that Congress never conferred upon the Labor Board or the courts such authority. In fact, reading such authority into the law would contradict the policy favoring the private resolution of disputes. *See H. K. Porter Co., Inc. v. NLRB,* 397 U.S. 99 (1970).

II.

The lower court's application of the accrual rule was not an abuse of discretion.

The decisions below can be summed up by saying that on July 7, 1981, Dowty would have had sufficient knowledge and would have been free of any legal barrier to sue the Union and Pioneer. The courts reached this conclusion by applying the standards set forth in Fed. R. Civ. Pro. 56(c), *Bd. of Education v. Pico,* 457 U.S. 853, 863 (1982) and *Atlas Concrete Pipe, Inc. v. Au & Son, Inc.,* 668 F.2d 905 (6th Cir. 1982). After placing Dowty's pleadings and proofs in the most favorable light, it was concluded that his claim accrued on July 7th.

By the end of the July 7th meeting, Dowty knew that an unfavorable arbitration award had been handed down. He also knew that the Union was concurring in the award. The Union advised Dowty to reclaim his job. Whether Dowty had to give up all or some of his outside activities is irrelevant to the issue of accrual of his action. What was important to the courts below is that on July 7th Dowty knew that he had to give up *some* outside income or forfeit his job. Dowty also knew that the Union was not going to challenge the award.

By July 7th Dowty also knew what steps the Union had taken in representing him, how the Union had conducted the hearing, what evidence or arguments considered important by Dowty were ignored by the Union and that the

Union had not allowed Dowty's attorney to take part in the proceedings. Thus, it was held below that every element in his complaint was known to Dowty on July 7th. *Dowty v. Pioneer Rural Electric Cooperative,* 573 F.Supp. at 158, *aff'd* 770 F.2d at 56-57.

As to the employer, Dowty had been out of work and off the payroll since early 1981. What more did Dowty need to know to discover that Pioneer had caused him an injury? The only bar to suing Pioneer earlier was the requirement that he first exhaust the grievance procedure. (The requirement of exhaustion of contractural remedies also, presumably, tolls the limitations period.) On July 7th the grievance procedure was exhausted. Nothing barred Dowty from commencing his action on July 8th.

Given this record, there is no question that the lower courts acted within their discretion in dismissing the complaint. There was no novel approach involved which warrants further review by the Supreme Court.

CONCLUSION

For all of the reasons set forth above, the Union asks that Dowty's petition be denied.

Respectfully submitted,

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DAVID STOLOW
On the Brief

AFFIDAVIT OF EDWARD J. COGGINS, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOUGLAS A. DOWTY
Plaintiff

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC., et al.
Defendants

CASE NO. C-3-82-005
(Judge Rice)

AFFIDAVIT

STATE OF OHIO
COUNTY OF MONTGOMERY, SS:

I, EDWARD J. COGGINS, JR., being first duly cautioned and sworn, deposes and says as follows:

1. I am the Regional Director, Region 3, of the Utility Workers of America and have served in that capacity since 1972.

2. As Regional Director, I occasionally become involved in the processing of grievances but do not become involved in all grievances.

3. Douglas A. Dowty has been a member of the Utility Workers Union, Local 469, since 1972, and was a member of the Union at all times relevant hereto.

4. On November 10, 1980, Dowty filed a grievance, protesting notice from his employer, Pioneer Rural Electric Cooperative, Inc., that he would be terminated from his position as Lineman Leader for engaging in outside or moonlighting activities in conflict with company policy.

5. Dowty was terminated by the company on December 12, 1980.

6. Pursuant to the terms of the collective bargaining agreement between the company and Local 469, Dowty's grievance was processed to arbitration. The arbitration hearing was conducted on April 15, 1981, before Harry J. Dworkin. I appeared at the arbitration hearing on behalf of Local 469.

7. On May 13, 1981, I submitted a Post Hearing Brief to Mr. Dworkin for and on behalf of Local 469.

8. On June 24, 1981, Mr. Dworkin issued an Award regarding Dowty's grievance, a copy of which was mailed to me. Upon receipt of Mr. Dworkin's Award, I contacted Gene Potter, who then contacted Dowty and Larry Rench, President of Local 469, and made arrangements for the four of us to meet on July 7, 1981.

9. Gene Potter, Larry Rench, Douglas Dowty and I met in Zanesville, Ohio, in my guest room at the Holiday Inn, at approximately 7:00 P.M.

10. During the meeting, I read the Post Hearing Brief of the company and discussed it with Dowty, Rench and Potter. I also read the Union's Post Hearing Brief and discussed it with the others.

11. During the meeting, Dowty informed me that he had read the Union's Post Hearing Brief several times. Dowty expressed the opinion that the arguments raised in the Union's brief should have yielded a favorable result to his grievance.

12. During the meeting, I also read the Arbitration Award of Mr. Dworkin and discussed the Award with Rench, Potter and Dowty. I advised Dowty that I had contacted Mr. Dworkin after receiving the Award for the purpose of obtaining a clarification of the last paragraph of the Award. I informed Dowty that Mr. Dworkin had indicated to me that he could continue to sell electrical generators and perform related work, such as servicing and installing electrical generators.

Affidavit of Edward J. Coggins, Jr.

13. During the discussion of the Arbitration Award at the meeting on the evening of July 7, 1981, the Union decided that it would dissent to I and II of the Arbitrator's Award and that it would concur in parts III and IV of the Award.

14. Based upon the discussion that was had, regarding the Arbitration Award, on the evening of July 7, 1981, I advised Dowty to take his job back in accordance with the terms of the Award.

15. As of July 7, 1981, Dowty had actual knowledge of the contents of the Arbitration Award, dated June 24, 1981, and had actual knowledge of the Union's position regarding that award, *i.e.*, that it would dissent from I and II of the Award, and would concur in III and IV. A true and accurate reproduction of the Arbitration Award is attached hereto as Exhibit "A-1".

Further affiant sayeth naught.

/s/ *Edward J. Coggins, Jr.*

EDWARD J. COGGINS, JR.

SWORN to before me and subscribed in my presence by the said EDWARD J. COGGINS, JR., this 1st day of July, 1983.

/s/ *Lessia K. Brandel*

NOTARY PUBLIC

LESSIA K. BRANDEL fka DEARTH, Notary Public
In and for the State of Ohio
My Commission Expires Nov. 24, 1986

EXHIBIT A-1, AWARD OF ARBITRATOR

AWARD OF ARBITRATOR

In the Matter of the Arbitration Between:

PIONEER RURAL ELECTRIC COOPERATIVE, INC., Piqua, Ohio

-and-

UTILITY WORKERS UNION OF AMERICA, AFL-CIO, LOCAL UNION NO. 469

BOARD OF ARBITRATION

HARRY J. DWORKIN, CHAIRMAN

ROBERT L. ROBERTS	GENE A. POTTER
Company Designated Member	Union Designated Member

APPEARANCES

ON BEHALF OF COMPANY

JOHN E. LYNCHESKI (Reed, Smith, Shaw & McClay)	Counsel for Company
ROBERT L. ROBERTS	General Manager
RANDY H. KYTE	Urbana Foreman
LEON FRANCIS	Piqua Operations Manager
EUGENE H. CARNEY	Urbana Operations Manager

ON BEHALF OF UNION

EDWARD J. COGGINS, JR.	Regional Director
LARRY F. RENCH	President, Local 469
HANK J. CIANCIOLO	Secretary
DOUGLAS A. DOWTY	Grievant (First Class Lineman)

THE ISSUE

TERMINATION OF EMPLOYMENT BY REASON OF OUTSIDE BUSINESS ACTIVITY CONSTITUTING CONFLICT OF INTEREST IN VIOLATION OF RULE;

WAS TERMINATION WARRANTED, AND CONSISTENT WITH JUST CAUSE?

Exhibit A-1, Award of Arbitrator

PRELIMINARY STATEMENT AND BACKGROUND:

The grievant held the job classification of First Class Lineman. In addition, he served as Group Leader. His seniority date is February 29, 1972. The grievant was terminated on December 12, 1980, after eight years of continuous service. The reason advanced by the company as justifying severance of the employment relationship was that the grievant had engaged in outside business activity, which included servicing customers of the company, which the company viewed as constituting conflict of interest in violation of an established Plant Rule.

The company has represented that an established company rule, and long existing policy prohibits employees from engaging in certain types of business activity after working hours which constituted a conflict of interest, and inconsistent with the legitimate interest of the employer.

The union challenges both the rule, and the manner of its application in the instant case. The grievance appealed to arbitration alleges that the grievant was improperly terminated, and that just cause was lacking, including the contention that the rule is unreasonable, was unilaterally promulgated, and lacks validity.

The employer is a relatively small operation with a total personnel of 50 people, 22 of whom are within the bargaining unit. The parties have had a continuous collective bargaining relationship for the past thirteen years, since 1967. The grievance before the Arbitrator is the first that has proceeded to arbitration.

Although the union has challenged the reasonableness of the rule, the application of which resulted in termination of the grievant's employment, the union does not dispute the fact that there are a set of policies, or plant rules drafted by the employer, and revised from time to time. The current set of Plant Rules were drafted, and made

effective September 25, 1980. The Plant Rule that prescribes restrictions on outside employment and activities is set forth in the "Policy Manual", under the subject "After Hours" Work for Another Employer or "Moonlighting". The text of the rule is as follows:

> PURPOSE:
>
> To provide an equitable, uniform policy to be followed by management in defining specifically certain moonlighting jobs which conflict with employment with the Cooperative, and to discourage employees from working extra jobs outside of their employment with the Cooperative.
>
> POLICY:
>
> The Board of Trustees explicitly discourages the working of additional or 'after hours' jobs by cooperative employees. Studies by industrial psychologists and other experts indicate that such 'after hours' work can and often does interfere with the safety, productivity, efficiency, attendance, and job satisfaction with the principal job.
>
> Moonlighting positions with any bank, savings and loan association, data processing company, answering service, etc., or any other company with which the cooperative does business is strictly forbidden.
>
> Working 'after hours' for financial gain for himself/-herself or oanother[sic] employer, in any form of electrical work, trenching or tree and brush clearing, is strictly forbidden.
>
> Any employee who decides to take an extra job is urged to consult with his/her immediate supervisor to explore the possibility of a conflict before accepting such position.
>
> Any employee found to be holding a second position or performing work in violation of this policy shall

first be given the opportunity to cease and desist such activity. If the employee continues to violate this policy after such opportunity to cease and desist is given, he/she shall be subject to appropriate discipline, which may include dismissal.

The policy restricting certain types of outside employment had previously existed in a somewhat modified form. Thus, the May 16, 1977 policy provided, in part, that:

M. Employees shall not participate in outside business or commercial activities or services which will interfere with or conflict with their performance of duties or adversely affect the public relations or image of said corporation.

The grievant is charged with having engaged in a business venture outside of his employment which included the sale of emergency electric generators to customers of the company, and to other members of the cooperative. The evidence indicates that the grievant had expanded his business activities so as to include the sale of material and electrical supplies to individuals who were also customers of the company. In addition, the grievant had undertaken contracting activities that included electrical wiring of homes and buildings, and installation of electrical equipment.

The company has represented that the grievant's outside activities had developed to a point where the company considered them in conflict with his employment as a First Class Lineman, and Group Leader, and that his activities were at variance with the company's interests, and in violation of its policy. The grievant's responsibility as Group Leader required that he exercise quasi-supervisory authority over Group Linemen in absence of a regular member of supervision. The grievant's normal hours of work during the Winter Season were 8:00 a.m. to

5:00 p.m., and 7:00 a.m. to 4:30 p.m. during the Summer Season. The grievant was subject to additional hours on a call-out basis when necessary to correct outages, which were by their very nature unpredictable.

The company represents that its policy restricting outside business activity is one of long standing. The company cites an instance on September 23, 1959, prior to advent of the union in which an employee, Harry Niece, performed insulation work, and installed an air conditioner for a customer of the cooperative. The company wrote to the employee on September 23, 1959, stating that:

* * *

> By your acting as an outside contractor you are placing Pioneer in an embarrassing position.
>
> The fact that househeating and insulation is so allied with Pioneers work will sooner or later get us into trouble. You must decide to be either an employee, or an outside contractor on your own. We are bound to have trouble as long as you work in a dual capacity. As soon as another contractor enters the field, or some member decides that Pioneer is actually selling househeating equipment we are going to be forced to ask you to decide which way you are going. Little things have come to me new that I don't like.

* * *

The grievant was similarly notified on October 14, 1980, after the extent, nature and scope of his outside business activities came to the attention of management. He was advised that he would be required to comply with the company's policy or, be subject to termination. The text of the October 14, 1980, letter is as follows:

> This will confirm our conversation of this morning which I informed you that, in my opinion, your present 'outside' employment activities are in violation of Pioneer Policy Bulletin No. 6-R, 'After Hours' Work for Another employer or 'Moonlighting.'

Please advise me how you intend to comply with the policy. I believe ten days would be a reasonable length of time to arrive at your decision. If I have not received your reply by October 27, 1980, I will assume you have decided to continue with your private electrical contracting business and will act accordingly.

On October 24, 1980, the grievant responded to the company's letter in which he expressed the desire to continue his employment with the Cooperative, but made no reference to his outside business activities.

The company thereupon on November 7, 1980, informed the grievant that his employment was being terminated effective December 12, 1980.

A grievance was filed on November 17, 1980, protesting the termination, and alleging that the action was not supported by just cause. The text of the grievance asserted that the company's policy was drawn up approximately seven years after the grievant had started his "moonlighting", and that "the local union is in complete disagreement with this policy."

APPLICABLE PROVISIONS OF AGREEMENT:

ARTICLE VII - SENIORITY

* * *

A complete loss of seniority will result when any employee:

* * *

3. Is discharged for proper cause.

* * *

ARTICLE IX - GRIEVANCE AND ARBITRATION PROCEDURE

* * *

Both parties, the Union and Management, agree it is not the intent of either party to deliberately withhold pertinent information in grievance discussions in the

primary steps with the purpose of later bringing said information up in the final step of arbitration.

* * *

ARTICLE X - RIGHTS OF MANAGEMENT

The management of the Cooperative shall have the direction and control of the property and operations, and the composition, assignment, direction and determination of the size of working forces belong to, reside in and shall be controlled by the Cooperative, provided that these rights shall not be exercised for the purpose of unjust discrimination against any employee, or to avoid any of the provisions of this agreement.

POSITION OF EMPLOYER:

The company points out that its policy restricting certain types of outside employment, and activities that present a conflict of interest is reasonable, has been in effect since at least 1967, and has been uniformly enforced. The company represents that when employees are hired they are specifically instructed that the company's policy precludes inconsistent employment, and are made aware of the consequences that would follow in event an employee should refuse to discontinue such business activities.

The company reasons that the policy, and the purpose designed to be achieved are reasonable, directly related to the company's operations, and is warranted under the reserved rights principle, as appears in the contract, (Article X - Management Rights).

Testimony was adduced through Robert L. Roberts, General Manager, who has been with the Cooperative for some twenty-one years, fourteen of which have been as General Manager. He testified that the Cooperative is owned by some 11,000 member-consumers, that it is organized as a non-profit cooperative; its principal business consists of providing residents of three counties with

electrical power. The Cooperative is governed by a Board of Trustees who are charged with formulating operating policies and regulations. There are some twenty-seven (27) similar cooperatives in the State of Ohio, Pioneer being the second largest.

The company acknowledges that when the grievant was hired, in 1973, the policy had not been reduced to written form, and was orally communicated to the grievant. As regards the history of the policy, it was first promulgated in oral form several years prior to advent of the union. The policy was deemed warranted by reason of situations that had developed of Cooperative employees being engaged in electrical activity, and various types of construction work in direct competition with the employer, and in conflict with its legitimate interests. The purpose of the policy was to avoid, and guard against conflicts, or potential conflicts with the business of the employer, including the need to enhance the Cooperative's image, and assure continued good public relations with its customers.

Claims were advanced by the Cooperative that, in a number of instances the outside activities of certain of its employees were identical to the normal business activities of the Cooperative. Additionally, it is represented that where an employee works a full schedule of hours, in event he thereafter engages in extensive business activities on his own time it tends to diminish the employee's physical capabilities, and restricts his availability to correct outages.

The Cooperative assured the Board of Arbitration, and members of the union that it has no intention of barring all moonlighting, or outside business activities on the part of its employees. The policy is designed to apply so as to limit and discourage outside activities which clearly confict with the employer's business interests and functions.

The company represents that the grievant was fully informed of the policy prohibiting certain types of outside activities as of the date of his hire which was February 29, 1972. Thereafter, on May 16, 1977, the policy was set forth in written form, and distributed among all employees.

As regards the grievant's outside activities evidence was adduced that, commencing with the year 1979, he engaged in the electrical contracting business and for a time had opened a store in St. Paris, Ohio, which was closed after some two months. Among the activities that were documented by the company were various jobs performed by the grievant in the nature of electrical contracting services. The grievant had purchased a line truck, and hired at least one employee. Evidence was adduced that on one occasion the grievant contracted to install cross-arms on light poles that had been sold, and installed by the Cooperative for an athletic field of the Graham Consolidated School, which the company represented clearly presented a conflict of business interest, and caused confusion. In addition, the grievant sells generators to persons who are members of the Cooperative. He also had contracted for various types of electrical wiring within the geographical areas served by the Cooperative. The Cooperative asserts that the grievant's outside business interests overlapped in many instances the work normally performed by the Cooperative.

Upon assessing, and evaluating the full scope of the grievant's outside business interests members of management confronted the grievant with the information that had been gathered, and reviewed with him the policy restricting certain types of outside activity. The grievant responded that he was unaware of the company's policy, and asserted further that the policy had been promulgated after the grievant was hired, and thereupon was not applicable to him. The grievant was given the option of discontinuing his outside business activities, or severing

his employment with the company which action was taken upon the grievant's failure to give assurance that he would comply with the policy.

POSITION OF UNION:

The union maintains that the company acted improperly, and in violation of the contractual rights of bargaining unit employees when it decided to terminate the grievant's employment following his refusal to accede to the employer's request that he discontinue his outside business activities. As indicated in the text of the grievance the union challenges both the company's action in terminating the grievant's employment, and validity of the policy on the ground that it was unilaterally formulated without negotiation with the union, and that the policy is arbitrary, and unreasonable.

The union has made it clear that it does not challenge the employer's right to establish reasonable rules and regulations; however, the authority contained in Article X - Rights of Management, is expressly made subject to, and governed by the company's obligation to assure that the company's rules and regulations are in all respects consistent with the agreement, and that it will avoid "unjust discrimination against any employee."

The union concedes that since approximately 1973, the grievant has been engaged in contracting activities, including wiring of domestic, and commercial buildings, sale of electrical generators, and electrical supplies. The grievant acknowledged also that he advertises his contracting business in local newspapers, and radio stations. Such advertise ments have also appeared in "Country Living" which is a house organ published by the Rural Electrical Cooperative Association of which Pioneer is a member, and therefore, had full knowledge of the nature of the grievant's outside business activities. The grievant's advertisement in this

publication related to the sale of emergency generator equipment.

The grievant testified that he was totally unaware of the company's policy restricting employees from engaging in outside activities until some time in September, 1980. Further, the grievant was hired in 1972, at which time there was no written policy, and the grievant did not consider himself to be bound by a "subsequently established" policy.

The grievant on cross-examination acknowledged that a substantial part of his electrical contracting business has been with both members, and customers of Pioneer Co-operative. The grievant admitted that on two occasions he used his employer's line truck without permission in performing private electrical work on the premises of one of Pioneer's customers, which work involved crimping, and installation of a generator.

The grievant represented that his electrical contracting business is quite limited in scope; that he at no time had more than one employee, who was let go in March, 1980. The grievant had purchased a line truck which he uses in digging and setting holes incidental to electrical work which he performs for customers.

The union urges that the termination of the grievant's employment under the circumstances here present was unwarranted, and not for just cause. The action taken by the employer was inappropriate, and in violation of the security clauses of the Collective Bargaining Agreement. Employees are entitled under both the express, and implied terms and conditions appearing in the agreement, to be secure in their employment except where discipline, or termination is warranted for reasons constituting just cause. The union reasons that:

Discipline is a very serious matter and in a discipline case the initial burden is on the Company to prove that the Grievant misconducted himself in a manner warranting discipline. Surely, the Management's after-the-fact endeavor to rationalize their inappropriate action cannot be condoned. Not once, in the Grievant's entire course of employment was he ever reprimanded for his work performance. To the contrary, prior to the instant matter, the Grievant has been praised.

Corrective discipline requires patience of supervision and requires that employees be dealt with fairly and objectively. Further, corrective discipline presupposes that the primary purpose of punishment is to correct wrongdoing rather than wreak vengeance on an employee. Management must give consideration to reasonableness and practicability in the exercise of its disciplinary powers. (Union Brief, p. 7)

FINDINGS AND OPINION OF CHAIRMAN:

The evidence adduced at the arbitration hearing established that the grievant was an employee of Pioneer with some eight years of service. The grievant had a satisfactory employment record throughout his period of employment. In addition, he was given the additional responsibility of Lineman Group Leader, in absence of the regular supervisor.

It is a well established principle, and within the scope of the management rights clause as set forth in Article X that, an employer is vested with the right to draft, and promulgate reasonable rules and regulations designed to govern its operations, and control the activities of its employees, including rules relating to work procedure, and extending to a more limited degree to outside activities that appear to be directly related to work performed on behalf of the employer. The reasonableness of a particular

rule, and its application, are at all times subject to challenge by the union, or an affected employee through the grievance procedure, including appeal to arbitration as is here the case. Thus, although Plant Rules are unilaterally established and not subject to negotiation, they are to be observed by employees subject to the rules, with the right to grieve in event a rule appears to be unreasonable or arbitrary, or, in event the rule is enforced in a manner that would constitute discrimination, deprivation of a right or benefit of a contractural nature, or that may result in disciplinary action unsupported by just cause.

The issue with which the Board is here concerned relates to the content and application of the employer's policy, which since 1977 has been set forth in written form, and revised on September 25, 1980. The company's policy prohibits "moonlighting", or, "after hours" work for another employer, and restricts outside activities that are deemed inconsistent with the employer's interests. The text of the policy refers specifically to "certain moonlighting jobs which conflict with employment with the Cooperative". It is apparent that the policy is not intended as a blanket prohibition, or restriction on all forms of outside employment, or business activity. The policy is designed to deal with only such outside activities as constitute a conflict of interest, or which directly compete with the employer's business, and involve its members, or customers. The policy appears to constitute a restatement of the principle that one cannot simultaneously serve two masters, and that a measure of loyalty is an indispensable prerequisite to the employment relationship.

The evidence adduced before the Board of Arbitration establishes that the rule prohibiting certain types of outside business activities is reasonable, and designed to safeguard and protect the legitimate interests of the employer against

outside, competitive business activities on the part of employees of the Cooperative. The rule is based on the premise that certain types of after hours work can and often does "interfere with the safety, productivity, efficiency, attendance and job satisfaction with the principal job." Further, that portion of the policy that prohibits engaging in business activity with members, or customers of the Cooperative is well within the legitimate right of management to protect its operations, such rule would particularly apply to after hours work involving installation of electrical equipment, wiring, and similar activities that are customarily and normally performed by the Cooperative. One instance was cited in which the grievant used a company vehicle and crew to perform private electrical work on company time.

The policy does not prohibit every form of outside activity, but only such as are of the same character as performed by the Employer. Employees who engage in such outside employment are accorded an opportunity to consult with their supervisor so as to determine whether a conflict of interest is likely to exist. Finally, an employee is not summarily discharged even where it is determined that his outside employment presents a conflict of interest in violation of the policy. Pursuant to the rules the employee is accorded "the opportunity to cease and desist such activity"; termination results only in event the employee refuses to discontinue his competitive employment. In short, he is given the choice of working for his employer, or, pursuing his outside interests.

The evidence in the instant case establishes by a clear preponderance that the grievant did, and continues to engage in the electrical contracting business outside of his employment which activities are within the purview of after hours work that is prohibited by the rule. As examination of the work performed by the grievant on his own

time clearly establishes that it is in direct competition with the business of grievant's employer.

The evidence indicates further that suppliers, and salesmen have had occasion to inquire of the Cooperative concerning purchases made by the grievant, and requesting payment. Thus, persons dealing with the grievant appeared to be uncertain whether the grievant was acting on his own behalf as an entrepreneur, or, as an employee and agent for the Cooperative. It is reasonable to assume that such confusion would result, including the Cooperative's relationship with the grievant. In one instance a supplier of generators, who was also a Cooperative member, and customer lodged a complaint that the grievant had become delinquent in paying for electrical supplies that he had purchased, and that the supplier contemplated pursuing legal action.

The evidence indicates that Pioneer's customers may frequently make inquiries of linemen in the field concerning their electrical needs, and solicit suggestions as regard electrical problems. In such instances, it may reasonably inferred that the lineman's response to the customer may be affected by the employee's outside business interests, thereby presenting a real, or potential conflict which the employer would be warranted in seeking to guard against.

There is ample evidence to warrant the conclusion that the grievant's outside electrical contracting business of the scope revealed at the arbitration hearing would constitute a case of dual loyalty, and conflict of interest which the policy is designed to restrict. The Chairman notes further that the company's policy is not in such form as to constitute a blanket prohibition against all types of outside activity, but only such as overlap the company's customary business functions. Several of the company's employees engage in various types of after hours work, such as raising bees, farming, and other types of outside jobs

which are not considered in conflict with the company's operations.

The Chairman notes further that the policy does not mandate termination of employment immediately upon disclosure that an employee is conducting an outside business in conflict with the interest of the employer. The policy commendably accords the employee an opportunity to decide whether to continue his outside work, or remain with the company. Should an employee refuse to "cease and desist" from his outside employment, he may be subject to appropriate discipline, which may include dismissal, but does not mandate dismissal in all cases.

In light of all of the attendant circumstances, including the grievant's relatively long tenure of service, and otherwise satisfactory work record, it is the recommendation, and award of the Chairman that the grievant be accorded the option of discontinuing his outside business activities within ten (10) days of receipt of the Award, in which event he shall be reinstated to his employment without loss of seniority, but without any reimbursement for lost earnings.

However, inasmuch as the grievant had been engaged in selling electrical generators since approximately 1975, with full knowledge of members of management it would not appear that continuation of such sales would be deemed in conflict with the company's interests, nor within the activities that are "strictly prohibited" under the policy.

Respectfully submitted,

/s/ Harry J. Dworkin

HARRY J. DWORKIN, CHAIRMAN

Exhibit A-1, Award of Arbitrator

AWARD

In the Matter of the Arbitration Between:

PIONEER RURAL ELECTRIC COOPERATIVE, INC., Piqua, Ohio

-and-

UTILITY WORKERS UNION OF AMERICA, AFL-CIO, LOCAL UNION NO. 469

I.

The Board of Arbitration finds and determines on the basis of the evidence adduced at the arbitration hearing, and consideration of documentary exhibits, and post hearing briefs, that the company's policy prohibiting certain types of "after-hours" work, or "moonlighting" on the part of its employees is reasonable, and within the recognized rights of management as set forth in Article X, of the Agreement;

II.

The evidence establishes that the company's policy was orally communicated to the grievant in 1973 at the time he was hired, and that said policy was set forth in written form in 1977, copies of which were distributed to the company's employees.

III.

The union is accorded the contractual right in each instance to challenge a plant rule, or policy unilaterally drafted by the company including the right to grieve the application of a rule on behalf of individual employees;

IV.

It is the judgment of a majority of the Board of Arbitration that the grievant be accorded an opportunity to determine within ten (10) days from the date of receipt of this Award whether he will agree to discontinue his outside business

activity as a condition of being reinstated to his employment, without loss of seniority but without reimbursement for any incidental loss of earnings.

AWARD SIGNED, ISSUED AND DATED BY THE CHAIRMAN, AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 24th DAY OF JUNE, 1981.

/s/ Harry J. Dworkin

HARRY J. DWORKIN, CHAIRMAN

/s/ Gene A. Potter

Union Designated Arbitrator Concurs with Items III & IV and Dissent to items I & II in the above Opinion and Award

/s/ Robert L. Roberts

Company Designated Arbitrator Concurs in the above Opinion and, Award

AFFIDAVIT OF DOUGLAS A. DOWTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOUGLAS A. DOWTY — CASE NO. C-3-82-005

Plaintiff, — JUDGE RICE

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC., et al.

Defendants

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN ss:

Douglas A. Dowty, being first duly cautioned and sworn, does hereby state the following:

1. I am the plaintiff in the above captioned action and have personal knowledge as to all matters hereinafter referred to.

2. I have read the affidavit of Edward J. Coggins, Jr. submitted with defendant Utility Worker's Union's Memorandum in Reply to plaintiff Dowty's Supplemental Memorandum and recall the meeting in Zanesville of July 7, 1981 involving myself and the three Union officials, Larry Rench, Gene Potter and Edward J. Coggins, Jr.

3. At the July 7, 1981 meeting, I was advised that I would receive a formal and final copy of the Arbitration Award of Mr. Harry J. Dworkin by certified mail. I understood from this meeting with the Union officials of July 7, 1981 that the copy of the Arbitration Award to be sent to me by certified mail would be my formal, official notice of the decision and award of the Arbitration Panel.

4. At the meeting of July 7, 1981 with the Union officials, I was never given a copy of the Arbitration Decision and Award involved herein to read or keep. I did not receive a copy of the Arbitration Decision and Award until a copy was delivered to me by certified mail as promised in the meeting. I received that certified mail copy on July 10, 1981 in an envelope which also contained the original of a letter from Robert L. Roberts, a copy of which is attached hereto as Exhibit "A".

5. At the meeting of July 7, 1981, I was advised by Mr. Coggins that under the terms of the Arbitration Decision and Award, I could no longer perform any electrical wiring outside of my employment with Pioneer. To service and install electrical generators, it is essential to perform electrical wiring, as I had always done in connection with my outside business activity. The final, official copy of the Arbitration Decision and Award which I received on July 10, 1981 is the same as the copy submitted with the Memorandum in Reply described in paragraph 2 above, which contains no provision allowing me to perform service and installation of electrical generators as Mr. Coggins maintains in his affidavit.

6. I was not terminated by Pioneer Rural Electric Company on December 12, 1980. I remained employed with Pioneer until July 20, 1981, ten days after I received the letter attached hereto as Exhibit "A".

Further affiant sayeth naught.

/s/ Douglas A. Dowty

DOUGLAS A. DOWTY

SWORN TO AND SUBSCRIBED BEFORE ME THIS 19 DAY OF JULY 1983.

/s/ Thomas L. Davis

NOTARY PUBLIC

THOMAS L. DAVIS, Attorney-At-Law
NOTARY-STATE OF OHIO
My commission has no expiration date.
Section 147.C3 R.C.

Exhibit "A"

Pioneer Rural Electric Cooperative, Inc.

Phone (513) 773-2523

July 8, 1981

CERTIFIED MAIL

Mr. Douglas A. Dowty
P. O. Box 637
St. Paris, OH 43072

Dear Mr. Dowty:

Enclosed is a copy of the Arbitrator's Opinion and Award in the Matter of Arbitration between Pioneer Rural Electric Cooperative, Inc. and Utility Workers Union of America, AFL-CIO, Local Union No. 469, involving your formal grievance. I believ the Award to be self-explanatory.

If we do not receive your commitment in verification of the judgement within ten calendar days of receipt of this letter we shall effect your termination as of that date.

Sincerely yours,

PIONEER RURAL ELECTRIC COOPERATIVE, INC.

/s/ Robert L. Roberts

Robert L. Roberts
General Manager

RLR:jvd

Enclosure

cc: Mr. Larry Rench
President, Local 469, U.W.U.A.

Mr. Harry J. Dworkin
Attorney at Law
911 Public Square Building
Cleveland, OH 44113